IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2007

STATE OF TENNESSEE v. JIMMY DEWAYNE LENTZ

Direct Appeal from the Circuit Court for Marshall County
No. 16819 Robert Crigler, Judge

No. M2006-01774-CCA-R3-CD - Filed August 13, 2007

Following a jury trial, Defendant, Jimmy Dewayne Lentz, was convicted of vandalism, a Class C felony. The trial court denied Defendant's request for alternative sentencing and sentenced Defendant to five years, six months in confinement. On appeal, Defendant argues that the evidence was insufficient to support the jury's finding that the value of the property vandalized was in excess of $10,000. Defendant does not appeal the trial court's denial of alternative sentencing but argues that the trial court erred in determining the length of his sentence. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J. C. MCLIN, J., joined.

Donna Leigh Hargrove, District Public Defender; Andrew Jackson Dearing, III, Assistant Public Defender; and Michael J. Collins, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Jimmy Dewayne Lentz.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Justin Reynolds, a correctional officer at the Marshall County Jail, placed Defendant in holding cell 16 on the evening of March 31, 2004. Defendant asked for some water, and Officer Reynolds left the area to comply with Defendant's request. Officer Reynolds testified that cell 16 was dry when he left Defendant, and no one else was in the cell. Approximately fifteen minutes later, the jail's fire alarm system was activated. Officer Reynolds alerted the dispatcher to radio for

assistance. Officer Reynolds and other correctional officers evacuated approximately ninety inmates into the jail yard.

Officer Reynolds approached holding cell 16 to evacuate Defendant. When he got to the hallway leading to the cell, Officer Reynolds noticed approximately two inches of water on the floor. Officer Reynolds looked through the window of cell 16 and observed water gushing out of the sprinkler located on the wall approximately ten feet above the floor. Defendant was standing on the concrete pallet which served as the cell's bed. Defendant said, "I am getting water."

Correctional Officer Catherine Mueller testified that after the fire alarm was activated, water gushed out of the booking room area at a depth of approximately four to five inches and spread throughout the area. Officer Mueller said that the Lewisburg Police Department, the Marshall County Sheriff's Department, and the Lewisburg Fire Department responded to the alarm. The source of the water was discovered when Defendant was evacuated from his cell. Officer Mueller said that water was gushing from a broken sprinkler in Defendant's cell.

Officer Mueller said that Defendant was placed in a restraint chair. Defendant stated, "I told you I would get water." Defendant told the officers that he tied a loop in a piece of cloth, hung it around the sprinkler, and "yanked a couple of times."

Chad Bass, a deputy with the Marshall County Sheriff's Department, was the Marshall County dispatcher at the time of the incident. Deputy Bass testified that the dispatch office contained one computer which received and tracked 911 calls, one NCIC computer maintained by the TBI, and one computer which tracked complaints. The hard drives for each of the computers were on the floor. Deputy Bass said that water began to flood the dispatcher's office shortly after the fire alarm was activated. Deputy Bass attempted to construct a flood barricade but was unsuccessful. Eventually the area was covered with six or seven inches of water, damaging the three computers' hard drives.

On cross-examination, Deputy Bass testified that two of the dispatcher's computers were older but stated that the computer used to receive complaints was "fairly new." The NCIC computer was down for approximately thirty to forty-five minutes, and Deputy Bass acknowledged that the computers' hard drives and monitors were operational again at some point after the flood.

Correctional Officer Rick Keller testified that the jail's computers were working up until the time of the flood. Officer Keller said that after the water damage, however, the computers were not able to hook into the main server.

Terry Wolever performed maintenance services for the Marshall County Jail. Mr. Wolever testified that he received notification that the jail had a broken sprinkler shortly after 10:00 p.m. on March 31, 2004. Mr. Wolever said that the sprinklers in the jail cells could be activated with such items as plastic bags, clothing, and strings. Mr. Wolever replaced the broken sprinkler in cell 16, silenced the fire alarm, and reactivated the alarm system.

Freda Terry, director of accounts and budgets for Marshall County, testified that she was responsible for the payment of invoices charged to the Marshall County Jail. Ms. Terry testified that as a result of the water damage caused by the broken sprinkler in cell 16, the following invoices were paid: $5,837.70 to the TBI for repairs to the NCIC computer in the dispatcher's office; $2,079.98 for replacement of one computer and monitor; $101.35 for Mr. Wolever's services; and $65.97 for a replacement sprinkler head. Ms. Terry stated that she received an estimate for the cost of repairing the water damage to the jail's tile and carpet flooring in the amount of $3,139.20, which included removal and replacement of the damaged flooring. Ms. Terry said that the work was not actually performed because the jail had been scheduled for renovations prior to the water damage. Based on these figures, Ms. Terry testified that the value of the property damaged as a result of the broken sprinkler was $11,224.20.

On cross-examination, Ms. Terry acknowledged that she believed that the monitor, which cost $550.80, was purchased as an upgrade and not as a replacement for an inoperable monitor. Ms. Terry stated on redirect examination, however, that the value of the property damaged, excluding the monitor, exceeded $10,000.00.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of vandalism of property valued in excess of $10,000. Specifically, Defendant contends that the testimony established that the monitor purchased after the incident was purchased not because of damage to the old monitor but because it was an upgrade. Defendant also argues that only the computer's hard drive was damaged at a cost of $115.00 as opposed to $2,000 to replace the entire system.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts in the evidence and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The offense of vandalism is committed by "[a]ny person who knowingly causes damage to or the destruction of any real or personal property of another or of the state, the United States, any county, city, or town knowing that the person does not have the owner's effective consent." T.C.A. § 39-14-408(a). "Damage" includes "[d]estroying, polluting or contaminating property," or "[t]ampering with property and causing pecuniary loss or substantial inconvenience to the owner or a third person." *Id*. § 40-14-408(b). "Acts of vandalism are to be valued according to the provisions of § 39-11-106(a)(36) and punished as theft under § 39-14-105." *Id*. § 40-39-408(c). The offense of vandalism is a Class C felony if the value of the damaged property is between $10,000 and $60,000. *Id*. § 39-14-105(4).

The value of the damaged property is either the fair market value of the property or service at the time and place of the offense; or, if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. T. C. A. § 39-11-106(a)(36)(A). Moreover, various panels of this Court have held that the value of the cost of repairs is an appropriate means of determining the value of the damage sustained to the vandalized property. *State v. Nona Pilgram,* No. E2004-00242-CCA-R3CD 2005, WL 602380, *5 (Tenn. Crim. App., at Knoxville, Mar. 14, 2005), *no perm. to appeal filed* (citing *State v. Terry W. Bean,* No. M2003-02062-CCA-R3-CD, 2004 WL 2412622, at *3 (Tenn. Crim. App., Nashville, Oct. 28, 2004), *no perm. to appeal filed*).

Officer Keller testified that before the water damage the computer that was replaced could be hooked into the main server but did not have this capability after the damage. Officer Keller said the server itself was not damaged because the server was on a four-foot tall shelf and wired through the ceiling. Based on our review of the record, a rational trier of fact could conclude that the value of the damage to the vandalized computer was at least $1,279.18, which was the cost to replace the computer and hard drive. The testimony concerning the monitor was ambiguous. Officer Reynolds testified that the computer's monitor was "fine." Ms. Terry testified that the CPU of the computer that was replaced was damaged, but she acknowledged that "the monitor might not have been damaged."

Nonetheless, even if the cost of the new monitor is not considered, the value of the damage to the vandalized property based on the evidence presented at trial is $10,689.94. Thus, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of vandalism over $10,000. Defendant is not entitled to relief on this issue.

III. Sentencing Issues

Defendant argues that the his sentence is excessive based on the nature of his offense. At the sentencing hearing, Beth Lauder with the Tennessee Board of Probation and Parole, testified that she prepared Defendant's presentence report which was introduced as an exhibit without objection. Ms. Lauder said that Defendant was thirty-one years old. He obtained his G.E.D. at the Taft Youth Center. Defendant worked for a roofing company from 1994 until 2000, but he had not held a job

since then other than a two or three weeks at a fast food restaurant. Defendant declined to make a statement during his interview other than to state that he had been "railroaded."

Ms. Lauder stated that Defendant's prior criminal history was lengthy and included a juvenile adjudication for aggravated assault. As an adult, Defendant was granted a probationary sentence for misdemeanor convictions at least twelve times, and he was found in violation of the terms of his probation on four separate occasions prior to the commission of the current offenses. Ms. Lauder stated that Defendant was incarcerated in the Marshall County Jail on other charges when he committed the current offense.

Defendant stated during his interview with Ms. Lauder that his step-father first gave him alcohol when he was three years old. Defendant said that he drank beer until he was nine years old when he started drinking liquor. Defendant said that he first used marijuana when he was nine years old and then progressed to cocaine and methamphetamine. Defendant also acknowledged that he periodically took Lortab, Percoset, and Xanax which he obtained from friends.

Ms. Lauder stated that prior to the sentencing hearing, Defendant was admitted to the Middle Tennessee Mental Health Center on April 4, 2005, for evaluation. Dr. Bill Regan stated in the report that although Defendant had been diagnosed as schizophrenic in the past, it was his belief that Defendant's psychosis was drug induced. At the end of the evaluation, Defendant showed no suicidal ideations or hallucinations and was found competent to stand trial.

Defendant testified on his own behalf at the sentencing hearing. Defendant continued to maintain that he had been "railroaded." Defendant admitted that he broke the cell's sprinkler which was "probably a two dollar piece to fix." Defendant said he had been wrongfully accused on several occasions "on account of being poor pretty much." Defendant denied that he had been diagnosed with schizophrenia stating, "On that question I have never openly discussed my religion." Defendant said that he had never been sentenced to the state penitentiary before and surmised that he would go in as "a petty felon and come out a murderer." Defendant believed that a sentence of incarceration "would only enhance [his] abilities to [be] a criminal at a larger extent."

At the conclusion of the sentencing hearing, the trial court found that enhancement factor (1), Defendant has a lengthy history of criminal conviction and behavior, was applicable and accorded this factor significant weight. T.C.A. § 40-35-114(2). The trial court also considered Defendant's juvenile adjudication for aggravated assault, which would have been a felony offense if committed as an adult. *Id*. § 40-35-114(21). The trial court found that Defendant had previously failed to comply with the conditions of a sentence involving release into the community. *Id*. § 40-35-114(9). The trial court also considered the fact that Defendant was incarcerated when he committed the current offense. The trial court found that Defendant was suffering from a mental condition to a certain extent as a mitigating factor. *Id*. § 40-35-113(8).

Based on the presence of four enhancement factors, the great weight placed on these factors, and the presence of one mitigating factor, the trial court sentenced Defendant to five years, six

months. The trial court denied alternative sentencing because of Defendant's numerous past failures to comply with the terms of his probation and ordered Defendant to serve his sentence in confinement.

We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, which became effective June 7, 2005. However, although Defendant was sentenced after the effective date of the Act, Defendant's crime in this case occurred prior to June 7, 2005, and Defendant did not elect to be sentenced under the provisions of the Act (as amended) by executing a waiver of his ex post facto protections. *See* 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo. State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

Defendant was convicted of vandalism over $10,000, a Class C felony. T.C.A. §§ 39-14-408, -105(4). As a Range I standard offender, he is subject to a sentence of between three and six years. *Id*. § 40-35-112(a)(3). In calculating the sentence for a Class C felony conviction, the presumptive sentence is the minimum of the range, or three years, if there are no enhancement or mitigating factors. *Id*. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum of the range, but still within the range. *Id*. § 40-35-210(d). If both enhancing and mitigating factors are present, the trial court must start at the minimum of the range, enhance the sentence within the range as appropriate for the enhancing factors, and then reduce the sentence as appropriate for the mitigating factors. *Id*. § 40-35-210(e).

We note initially that the trial court apparently found as an enhancement factor that Defendant was incarcerated in a penal institution on a misdemeanor charge when he committed the current offense. *See id*. § 40-35-114(13)(I) (2005). Prior to the 2005 amendments to the Sentencing Reform Act, a defendant's sentence could be enhanced only if the felony offense was committed

"while incarcerated for a *felony* conviction." *Id.* § 40-35-114(15) (2004). Defendant did not elect to be sentenced under the new act, and, therefore, the trial court erred in applying this enhancement factor.

Nonetheless, Defendant has been amassing juvenile adjudications and criminal convictions since he was thirteen years old. As a juvenile, he had one adjudication which would have been a felony if committed as an adult. Since turning eighteen, Defendant had twenty-one prior misdemeanor convictions before committing the current offense, and he has been convicted of three misdemeanor offenses between his conviction and sentencing hearing. *See State v. Johnnie C. Weems*, No. M2002-01857-CCA-R3-CD, 2003 WL 1563661, at *2 (Tenn. Crim. App., at Nashville, Mar. 27, 2003), *no perm. to appeal filed* (listing numerous cases in which this Court has held that previous convictions under enhancement factor [(2)] include convictions which were obtained after the crime in question but prior to sentencing). Defendant was granted probation for his prior misdemeanor convictions on numerous occasions, and he has served only a minimal time in confinement. Despite this, Defendant had failed to comply with the conditions of his probation on four separate occasions prior to the commission of the instant offense. In the presentence report and his psychiatric interview, Defendant acknowledged extensive drug usage until his incarceration.

When determining if incarceration is appropriate, a trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses; or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to defendant. T.C.A. § 40-35-103(1)(A)-(C). The trial court may also consider a defendant's potential or lack of potential for rehabilitation and the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. *Id.* §§ 40-35-103(5), -210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4).

This Court has previously stated that the weight assigned to a particular factor is left to the trial court's discretion so long as the trial court complies with the principles of sentencing, and the trial court's findings are adequately supported by the record. *State v. Boggs*, 932 S.W.2d 467, 475-476 (Tenn. Crim. App. 1996). Misdemeanor convictions alone may support application of enhancement factor (2). *See e.g. State v. Ramsey*, 903 S.W.2d 709, 714 (Tenn. Crim. App. 1995); *State v. Richard Warren*, No. M2001-02139-CCA-R3-CD, 2003 WL 354505 (Tenn. Crim. App., at Nashville, Feb. 14, 2003), *no perm. to appeal filed*. Based on our review of the record, we conclude that the trial court did not err in sentencing Defendant to five years, six months confinement for his vandalism conviction. Defendant is not entitled to relief on this issue.

We also note that Defendant did not raise a *Blakely* challenge to the trial court's determination of the length of his sentence. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In *Blakely*, the United States Supreme Court concluded that "'[o]ther than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000)). Nonetheless, the extent of Defendant's prior convictions alone supports a sentence of five years, six months.

CONCLUSION

After a thorough review, we affirm the judgments of the trial court.

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THOMAS T. WOODALL, JUDGE